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February 13, 2003

EX PARTE – Via Electronic Filing

Ms. Marlene Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

Re: CC Docket Nos. 01-338, 96-98, and 98-147

Dear Ms. Dortch:

Attached for inclusion in the record of this proceeding is a letter from Z-Tel, BridgeCom, Metropolitan Telecommunications, Birch Telecom, and Access Integrated Networks concerning NARUC's recent proposal.

In accordance with FCC Rule 1.49(f), this *ex parte* letter and the attachments are being filed electronically pursuant to FCC Rule 1.1206(b)(1).

Sincerely,

/s/

Christopher J. Wright
Counsel Z-Tel Communications, Inc.

February 13, 2003

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: NARUC's proposal, CC Docket Nos. 01-338, 96-98, and 98-147

Dear Ms. Dortch:

The National Association of Regulatory Utility Commissioners ("NARUC") recently proposed principles and standards for the FCC to adopt in the Triennial Review proceeding.[1] While NARUC's statement of principles is sound and the procedural framework it establishes to resolve unbundling disputes is virtually compelled by the D.C. Circuit's *USTA* decision,[2] we are writing to discuss a few aspects of the plan that warrant attention.

First, it is fully consistent with the *USTA* and *CompTel* decisions to vest fact-finding with State commissions. The procedural framework NARUC proposes starts with the baseline that all network elements that currently are made available to new entrants should continue to be made available, and directs ILECs that seek to "de-list" an element to "make a factual case before a State commission."[3] In light of *USTA* and the D.C. Circuit's later decision in *CompTel*,[4] a highly granular analysis is required where there is a serious question as to whether requesting carriers are impaired without access to an element. As NARUC recognizes, new entrants will not cease to be impaired in every geographic region at the same time, or with respect to every service they seek to offer. Indeed, *USTA* and *CompTel* require a level of granularity even more specific than NARUC suggests. Under those decisions the question will be whether, with respect to network element X (from NIDs to OSS), carrier A (from AT&T to Z-Tel), seeking to provide service B (from POTS to broadband) is impaired in geographic market C (from Alaska to Manhattan) to serve different types of end-users (from mass-market consumers to large, data-intensive businesses).[5] It is simply beyond the capabilities of a federal agency to make such specific determinations. As a practical matter, only the state commissions can do so.

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[1] Letter from David Svanda, NARUC President and Michigan commissioner, *et al.* to Chairman Powell, Feb. 6, 2003 ("*NARUC Letter*").

[2] *United States Telecom Association v. FCC*, 290 F.3d 415 (2002) ("*USTA*").

[3] *NARUC Letter* appendix.

[4] *Competitive Telecommunications Association v. FCC*, 309 F.3d 8 (2002) ("*CompTel*").

[5] *See* Letter from R. Curtis and T. Koutsky, Z-Tel, to Chairman Powell and commissioners, Dec. 20, 2002, at 6 ("*Z-Tel's Dec. 20 Letter*").

There is no merit to the claims of the incumbents that Congress has directed the FCC, and not the state commissions, to make unbundling decisions. The FCC unquestionably has authority to issue unbundling rules and to specify that certain network elements must be made available. But the statute does not make the FCC the **only** authority that can identify network elements and implement the section 251(c)(3) unbundling requirements. Indeed, Congress specifically gave to states authority in section 252(b) to arbitrate interconnection agreements, and Congress specifically required in section 252(a)(2) that those agreements contain a "detailed schedule" of network elements that are to be unbundled. For that reason, there is no real "delegation" question here: in sections 251 and 252 of the Act, Congress explicitly assigned the states a central role in determining what network elements are unbundled.

In addition to the section 252 process, section 251(d)(3) specifically preserves independent state access authority and section 252(e)(3) specifically preserves the states' ability to "establish[] or enforce[] other requirements of State law" in approving interconnection agreements. Plainly, as NARUC's principles provide, in the Triennial Review decision the FCC should confirm this wealth of state authority to establish unbundling obligations, rather than attempt to limit or preempt that authority. [6]

Second, the record of this proceeding on impairment for mass-market services is clear. The NARUC proposal contains an unsupported statement indicating that the record is "inconclusive" with respect to whether requesting carriers are impaired without access to unbundled switching in zones 1 and 2 for mass-market customers. In our view, the record in this proceeding is conclusive on that score – new entrants seeking to serve the mass market are impaired in the absence of reform of the manual hot cut process and will continue to be impaired in many circumstances even after the incumbents fix those problems.[7] Indeed, as Chairman Klein of the Public Utility Commission of Texas explained in a letter filed simultaneously with the NARUC proposal, the Texas commission recently took a very close look at this issue – a closer look than the FCC can – and concluded that "'even if in its Triennial UNE Review proceeding the FCC were to remove local switching from its national list, or create a new exception standard, ... CLECs in Texas would be impaired without the availability of local switching on an unbundled basis.'"[8] We are confident that once the facts are shown to state commissions nationwide, they will reach the same conclusion as the commissions in Texas, New York, and other states.

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[6] The ILECs' contentions concerning the appropriate role of the states are rebutted in more detail in *Z-Tel's Dec. 20 Letter* and in Letter from R. Curtis and T. Koutsky, Z-Tel, to Chairman Powell and commissioners, Jan. 29, 2003 (*Z-Tel's Jan. 29 Letter*).

[7] The evidence on impairment – which also shows that in the absence of unbundled switching incumbents provide discriminatory access to loops – was summarized in Letter from T. Koutsky *et al.*, Z-Tel, to Chairman Powell and commissioners, Jan. 29, 2003, and Letter from R. Curtis and T. Koutsky, Z-Tel, to Chairman Powell and commissioners, Jan. 30, 2003.

[8] Letter from Chairman Klein to Chairman Powell and commissioners, Feb. 6, 2003, at 2 (quoting Texas Arbitration Order, Texas PUC docket No. 24542, Oct. 3, 2002, at 87-88).

Because operational impairment exists with respect to all carriers seeking to serve mass-market customers, the details of NARUC's proposal that would apply different presumptions of impairment in different density zones do not correlate with the operational impairment mass-market entrants face. At present, the operational impairment caused by manual hot cuts (and the related economic impairment due to hot cuts) exists in all zones with respect to carriers seeking to serve the mass market. Line density is, at most, relevant to economic impairment, along with a host of other potential economic issues.

Third, a final framework must articulate a complete "impairment" standard that respects carrier-specific interests. We agree with NARUC's implicit premise that it is more important to focus on particular network elements than on words. It is nevertheless the case that while the incumbents' litigation record is generally dreadful, despite (or perhaps because of) their scorched earth approach, the incumbents have twice succeeded in persuading courts to require the FCC to reconsider its articulation of the meaning of "impair." (In that connection, it is important to emphasize that no court has accepted the incumbents' repeated arguments that new entrants are not impaired without access to the network elements comprising the platform or their argument that the FCC should adopt the "essential facilities" test to define "impair.") Therefore, it is important for the Commission to focus on the issue of how to articulate the impairment standard. CLECs have proposed standards that fully respond to these judicial decisions – Z-Tel in particular has proposed that a requesting carrier would be impaired without access to a network element if its output would decline by a substantial and non-transitory amount without access to the element.[9] A letter filed in this docket by Judge Bork provides cogent support for the adoption of that standard and explains how such an approach is fully consistent with *USTA*.[10]

In addition, it is important that the final impairment standard provide room for impairment inquiries that vary by carrier or class of carrier, a requirement that does not seem to have been contemplated by NARUC. The D.C. Circuit noted in *CompTel* that section 251(d)(3) "seems to invite an inquiry that is specific to particular carriers and services."[11] As the court recognized, the plain language of that statutory provision focuses upon the particular "service" that a particular "requesting carrier" seeks to provide. That language must also be read in conjunction with the requirements of the Regulatory Flexibility Act and Executive Order 13272, which call upon federal agencies to consider the impact their rules may have on small business entities.[12] Clearly, there are degrees of impairment: the impairment analysis is much different for small business entities with no switch in a state than a large business with extensive network services in a state. Subjecting all requesting carriers – large and small entities alike – to the same "impairment" analysis, or the same "blitzkrieg" schedule of state proceedings, or the same "transition plan" would do violence to the requirements of the Regulatory Flexibility Act.

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[9] That test was explained in detail in Z-Tel's Reply Comments, July 17, 2002, at 21-27, and in the accompanying declaration of George S. Ford.

[10] Letter from Robert H. Bork to Chairman Powell, Jan. 10, 2003.

[11] *CompTel*, *supra*, 2002 U.S. App. LEXIS 22407 at *13.

[12] Regulatory Flexibility Act, 5 U.S.C. § 601 *et* seq.;Exec. Order No. 13272 § 1, 67 Fed. Reg. 53,461 (2002).

Indeed, since section 251(d)(3) invites a "carrier-specific" inquiry, the Commission must engage in that inquiry in a manner consistent with the requirements of the Regulatory Flexibility Act.

Fourth, a complete standard must recognize the impact of section 271 on Bell operating company unbundling obligations. The NARUC proposal does not discuss or consider the legal requirement that Bell operating companies that choose to offer interLATA services must, by operation of law, offer unbundling pursuant to the section 271 competitive checklist. As of this writing, Bells offer interLATA service in 35 states. Unbundled loops, transport, switching, and signaling are clearly required by checklist items (iv), (v), (vi), and (x).[13] Since section 271 plainly requires those BOCs to provide unbundled access to loops, transport, switching, and signaling at cost-based rates, that requirements simplifies the process of determining what network elements must be made available considerably. Moreover, those checklist requirements are on-going obligations. The only methods in which the section 271 checklist may be modified are through Congressional action or FCC section 10 forbearance. As a result, the state-specific inquiries contemplated by the NARUC proposal need not (and indeed, cannot) trod into, waive, or alter any of these section 271 requirements.[14]

We note that several states, in their reviews of Bell 271 compliance, have clearly stated their expectation that the Bell will continue to provide unbundled access to switching. For example, in its letter recommending that the FCC approve SBC's application, the Michigan Public Service Commission stated that its "recommendation was predicated on the FCC's continuation of policies and rules that allow competitors access to UNE-P for the foreseeable future" and that would permit an "orderly transition to facilities-based competition" when that is warranted.[15] The Maryland Public Service Commission similarly stated in its letter recommending approval of Verizon's application that it is "extremely concerned that the FCC is considering modifications to the list of Unbundled Network Elements ('UNEs') and the availability of the UNE-Platform ('UNE-P')" because "[t]he evidence in this proceeding demonstrates that increased competition in Maryland exists in large measure because of the availability of UNE-P."[16]

* * * * *

With these clarifications, we urge the Commission to adopt the principles and procedural framework advanced by NARUC. Indeed, we do not think the FCC can adopt a framework that does not rely to a substantial degree on the state commissions to conduct the granular analyses required by the D.C. Circuit. With respect to switching, we urge the Commission to conclude that the record in the Triennial Review docket establishes that new entrants seeking to serve the mass market are impaired without access to unbundled switching. And we urge the Commission

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[13] 47 U.S.C. § 271(c)(1)(B)(iv), (v), (vi), and (x).

[14] The relevance of section 271 is explained in more detail in *Z-Tel's Dec. 20 Letter* and *Z-Tel's Jan. 29 Letter.*

[15] Letter from Chairman Chappelle *et al.* to Chairman Powell *et al.*, Jan. 13. 2003, at 2.

[16] Letter from Chairman Riley *et al.*to William R. Roberts, Dec. 16, 2002, at 9-10.

to supplement the NARUC proposal by adopting a carrier-specific "output" standard of impairment and to focus on section 271 as well as section 251 in its decision.

Sincerely,

/s/

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